

# Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes, and Character

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## INTRODUCTION

Lawyers frequently debate difficult issues of legal ethics. However, they rarely integrate discussions of legal ethics into any broader ethical theory. Some even deny the logic of any such enterprise. Under such a view, legal ethics merely serves to promote the interests of some or all lawyers, as distinguished from those of their clients or the public, without broader ethical ambition. No group, however, can immunize itself from broad ethical evaluation. The existence of a professional code of legal ethics is the beginning, not the end, of the ethical evaluation of lawyers' conduct.

This Article examines the ethical status of some crucial elements of legal ethics in an unusually broad and systematic way. This examination illustrates the possibility of genuine progress in understanding and evaluating legal ethics. In particular, the Article draws upon the ethics of character in order to transcend otherwise unresolvable conflicts between those who emphasize the importance of good or bad intentions and those who emphasize the importance of good or bad consequences.

In the process of carrying out this examination of legal ethics, those rules of legal ethics that tolerate the abuse of trial witnesses on cross-examination are called into serious question. The rules of legal ethics that allow an attorney to question witnesses in a manner intended to mislead or deceive the jury are also scrutinized. The ultimate aim of this Article, however, is not simply to criticize particular rules of legal ethics, but to encourage the criticism or defense of legal ethical rules in a broader, progressive, systematic way that takes account of disparities in the power of particular social groups.

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I. BASIC PROBLEMS IN LEGAL ETHICS  
AND BASIC PROBLEMS IN ETHICS

Let us consider two well-known problems in legal ethics. The first such problem relates to the cross-examination of a truthful witness in a manner intended to abuse, intimidate, or destroy that witness' credibility without casting light on a genuine issue in the case. The second problem involves a deceptive cross-examination of a witness whom the cross-examiner knows, through a confidential disclosure, is telling the truth. Both may arise in the context of an attorney's cross-examination of a witness in either a criminal or civil trial context.

The first problem can be vividly illustrated through a defense counsel's attempting to increase a rape defendant's chances of acquittal by means of a humiliating or degrading cross-examination of the victim where the attorney knows that the effects of that cross-examination are unlikely to significantly promote the accurate resolution of any relevant issue in the case.<sup>1</sup> In such a case, the attorney engages in "cross-examination by harassment,"<sup>2</sup> with the intimidation or destruction of a probably truthful witness<sup>3</sup> commonly being sought. Such tactics may also be calculated to establish an attorney's reputation as an especially vigorous cross-examiner of rape victims.

A precise understanding of such cross-examinations is really not necessary for the purposes of this Article. The above formulation might be varied slightly by thinking of abusive cross-examination as predictably and unjustifiably distasteful to the current or potential future witness, where the unjustifiability consists of a lack of substantial grounds for any belief by the cross-examiner that such a method is necessary to accurately and significantly shape or discredit the testimony of the witness on a

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<sup>1</sup> See, e.g., Richard A. Wasserstrom, *Roles and Morality*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 25, 27 (David Luban ed., 1983) [hereinafter *THE GOOD LAWYER*]; see also Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060, 1064-65 (1976) (describing the moral difficulties a defense lawyer faces when cross-examining a rape victim).

<sup>2</sup> R.J. Gerber, *Victory vs. Truth: The Adversary System and Its Ethics*, 19 *ARIZ. ST. L.J.* 3, 14 (1987) (describing how such cross-examination is one of the greatest impediments to truth).

<sup>3</sup> See *id.* It should be noted that deceptive or misleading questions on cross-examination need not amount to the kinds of actual fraud, deceit, or misrepresentation rejected by legal ethics codes in many contexts. See, e.g., *Fire Ins. Exch. v. Bell*, 643 *N.E.2d* 310, 312-13 (Ind. 1994) (rejecting misrepresentation by one attorney to another in a narrow, strict sense).

contested issue. It may be assumed that attorneys engage in such conduct for many reasons, but that such conduct is not clearly and invariably barred by codes of legal ethics.

Of course, legal ethics code limitations on such tactics exist,<sup>4</sup> and the availability of rape shield laws may provide some limitations as well.<sup>5</sup> However, these limitations merely set the stage for and do not attempt to resolve the ethical issues examined below. Ample basis in experience remains in support of the belief that telling the truth on the witness stand is no guarantee against a professionally ethically authorized attempt to destroy dignity and credibility on cross-examination, even where the questioning attorney is reasonably certain of the veracity of the witness.<sup>6</sup> It is, of course, difficult to believe that the reasonable anticipation of such professionally authorized abusive conduct does not tend to discourage the appearance of such witnesses.<sup>7</sup> It can be inferred that the professional ethics codes do not, to put it mildly, invariably mandate the subordination of the client's interests to the reasonably knowable truth.<sup>8</sup>

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<sup>4</sup> See, e.g., *infra* note 27 and accompanying text.

<sup>5</sup> Michigan pioneered legislation in this field. See Tanya B. Marcketti, Note, *Rape Shield Laws: Do They Shield the Children?*, 78 IOWA L. REV. 751, 753 n.10 (1993); see also MICH. COMP. LAWS ANN. § 750.520j (West Supp. 1991) (providing the current version of Michigan's statute). While generally prohibiting introduction of evidence of the victim's prior sexual conduct and reputation, rape shield statutes do not purport to solve the broad problem of abusive or harassing cross-examination in such cases and, even within their narrow scope, provide for the possibility of exceptions. See J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 578-89 (1980) (discussing the possible relevancy of sexual history evidence). For further discussion of the Michigan statute, see, e.g., *Michigan v. Lucas*, 500 U.S. 145 (1991) and *People v. Powell*, 506 N.W.2d 894 (Mich. Ct. App. 1993). For a discussion of rape shield laws in the context of adversarial ethics, see Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context*, 41 J. LEGAL EDUC. 29, 36-37 (1991).

<sup>6</sup> See, e.g., Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 5 (1951) (explaining that a lawyer is expected to treat non-clients as "barbarians and enemies"); Gerber, *supra* note 2, at 15 (quoting MONROE H. FREEDMAN, *LAWYERS' ETHICS IN THE ADVERSARY SYSTEM* 40-41 (1975)). The claim that lawyers are required by their professional ethics code to engage in such ruthlessness may be set aside; it is enough for the purposes of this Article that the relevant professional code merely permits such behavior, to one degree or another.

<sup>7</sup> In a somewhat different context, see DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 210-11 (1973) (describing a father's fear of permitting his daughter to testify at trial).

<sup>8</sup> See, e.g., James B. White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 872 (1983) (describing how a lawyer says "not what he believes to be true or right," but whatever will promote the client's interests); see

The second problem concerning cross-examination and legal ethics illustrates the complex and equivocal interplay of truth with other values in legal ethics. This sort of problem, like the first, commonly involves the cross-examination of a witness whom the questioner reasonably believes to be telling the truth and who is in fact telling the truth. However, this problem assumes that the only reason the cross-examiner knows the witness is telling the truth is through a confidential revelation by the cross-examiner's own client, induced by the cross-examiner's advance promise that such a confidential revelation will not be used to the client's prejudice.

The problem is sharpened by the further assumption that the cross-examiner's client, although in fact innocent of the charged offense or entitled to prevail in a civil case, is unlikely to prevail due to the apparent weight of other evidence. In some cases, an innocent client may face devastating adverse evidence. Thus, it is assumed that the client's chances of obtaining a just verdict would be materially increased if the cross-examining attorney were able to somehow discredit what the attorney knows, only under the above conditions, to be the truthful and accurate testimony of an opposing witness.<sup>9</sup> Sometimes, the truthful and accurate testimony of an adverse witness may seem far more incriminating than it really is. The attorney may be able to foresee a jury's overreaction to such testimony. In such a case, the cross-examiner must consider not only the problem of the appropriate use of the client's induced disclosure, but, more interestingly, the ethical problem of deliberately attempting to mislead the trier of fact, through discrediting a known truthful and accurate witness, for the sake of a just verdict.

Of course, every general statement of a problem in legal ethics abstracts away from the variations and uncertainties of real cases. But the two basic scenarios sketched above can be developed sufficiently to be resolved, rightly or wrongly, under existing codes of legal ethics. Those professional ethical judgments can then be critiqued or enriched by recourse to broader ethical traditions. It is possible that we might be so convinced of the rightness of the judgments within established legal ethics that we come to resolve all conflicts between judgments of legal ethics and those of our broader ethical traditions in favor of the former.

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also Fried, *supra* note 1, at 1062 (referring to the practice of "discrediting a nervous but probably truthful complaining witness").

<sup>9</sup> See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474-75 (1966) (describing how an attorney's failure to cross-examine a witness solely because his client has been candid with him should be precluded).

We might thus become so convinced of the moral soundness of contemporary legal ethics codes that we would wish to limit, modify, make exceptions to, or even repudiate one or more broader moral perspectives incompatible with our legal ethical judgments. But this result seems unlikely. Given the breadth of scope and experience embodied in familiar broader approaches to moral philosophy in general, we may more realistically expect instead to find ourselves reassessing our legal ethics codes, or at least rethinking their grounds and rationale.

Both types of problems in legal ethics outlined above, abuse and deception, may be characterized in broader ethical terms. It is close to the essence of each sort of problem that a possible conflict arises between following a traditionally respected general moral rule, such as treating others with a level of respect, and increasing the chances of obtaining a supposedly good or just outcome, such as the acquittal of the innocent or the proper, vigorous functioning of the adversary system.<sup>10</sup>

Plainly, these two scenarios do not pose a clear, unequivocal conflict between a moral rule and a good end without further complication. The most important complications will be discussed below.<sup>11</sup> First, we must recognize the conflicts raised by the two scenarios and place them in a broader moral context.

The two scenarios would seem to implicate possible general moral rules prohibiting, in the first case, the abuse, degradation, or humiliation of a person and, in the second case, the intentional deception or misleading of a person. These sorts of rules, to which many lawyers would be inclined to gravitate at least when "off duty," have clearly been popular in several important moral traditions.<sup>12</sup> But the two scenarios also raise, to differing degrees, the possibility of some morally good benefit from creating exceptions to or declining to follow such rules. Such moral payoffs might include the morally just disposition of the case itself, the benefits flowing from an adversary system operating as intended, and even the moral value of arriving at legal truth obtainable in no way other than through deception.

The possibility of tradeoffs between following familiar moral rules and obtaining morally good outcomes should be both obvious and

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<sup>10</sup> Of course, conflicts between rules may arise in these contexts. For example, a lawyer may point to a real or alleged conflict between a general moral rule against misleading or deceiving anyone, including a jury, and a general moral rule against betraying induced confidences, including those of a client. However, this conflict is not central to the general moral problem.

<sup>11</sup> See *infra* notes 36-112 and accompanying text.

<sup>12</sup> See *infra* notes 36-80 and accompanying text.

disturbing in the litigation context as well as in the broader moral realm. If good ends do not always justify otherwise immoral means, it seems equally doubtful that no good end, of any magnitude, could ever justify the use of even a minimally immoral means.<sup>13</sup> Truth-telling, for example, may sometimes impose uncomfortably high costs in wounded feelings, if not in lives themselves.<sup>14</sup>

Faced with such conflicts and in order to avoid potentially unattractive outcomes of moral rule-following, we may seek to relieve the tensions by endorsing all sorts of exceptions to the relevant moral rules or by narrowing the application of the rules themselves either generally or on an ad hoc basis.<sup>15</sup> Of course, limits to editing moral rules to fit our collective sensibilities in detail must exist, or the idea of a genuine moral rule becomes unrecognizable. On the other hand, any attempt to "balance," in a principled, non-arbitrary way, the value of a generally applicable moral rule against the disastrous or unattractive consequences of following that rule seems difficult, if not impossible in principle.<sup>16</sup> Nor can we plausibly avoid the conflicts by claiming that no violation of any credible moral rule is ever likely to avert a disaster or result in otherwise unattainable good consequences.<sup>17</sup>

Both inside and outside the courtroom, then, we feel the pull of moral rules, typically focusing on intention and state of mind and, in an opposite direction, the pull of achieving good or avoiding bad consequences. But we lack a principled way of commensurating rules or intentions on the one hand, and consequences, including attainable goods, on the other.

This situation is in some respects analogous to the current state of affairs faced by physicists. Physicists find themselves at ease when their

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<sup>13</sup> See Don Locke, *The Choice Between Lives*, 57 PHIL. 453, 472 (1982) (discussing how, to be justifiable, a particular good end must outweigh the drawbacks of the particular means used).

<sup>14</sup> See, e.g., RICHARD B. BRANDT, *MORALITY, UTILITARIANISM, AND RIGHTS* 309 (1992) (discussing how it is possible to exercise a moral virtue to excess).

<sup>15</sup> See, e.g., JOHN J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 90 (1973) (discussing non-absolute, non-universal, heavily qualified moral rules).

<sup>16</sup> See, e.g., *id.* at 73.

<sup>17</sup> While the nature and magnitude of the net payoff from secretly or openly violating a purportedly moral rule may be uncertain, some consequences may be so clearly important that failing to consider them would be morally irresponsible. At best, a healthy but rebuttable skepticism toward our ability to assess the major consequences of our actions, including the effects on our own character, may be justified. See THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 88-90 (1994) (providing a related discussion).

quantum theory can be applied in the absence of any significant gravitational effects and when their theory of gravity can be applied in the absence of any significant quantum effects. However, physicists currently have no consensually attractive, well-developed method of fully analyzing cases in which both quantum and gravitational effects are significant.<sup>18</sup>

By analogy, we in the legal field feel most comfortable when a lawyer's violation of a purported moral rule either resulted in no significant net benefits or was necessary to avoid obvious moral disaster. But when intentions (or the status of a moral rule) and the good or bad effects of following that moral rule both seem significant, we tend to lapse into arbitrariness and dogmatism.

Genuinely reconciling the roles of intentions or moral rules and the role of outcomes or consequences is probably impossible. However, the possibility of a partial, pragmatic, but not entirely arbitrary accommodation of intention and outcome through a moral focus on the idea of character is suggested and explored below.<sup>19</sup> First, though, the force and limits of broader moral rule-based critiques of established legal ethics must be considered in general and in the context of the two legal ethical problems discussed earlier.<sup>20</sup> Once the force of a moral rule-based or intention-based critique of current adversary practice and the limits of such a critique are appreciated, one can consider the role of the idea of character in reasonably resolving some of the remaining tensions between putative moral rules and the goods achievable under an adversary system only by violating such moral rules.<sup>21</sup>

Significant changes in contemporary legal ethics are morally required.<sup>22</sup> This is in part due to the conflicts between some established rules of legal ethics and the trumping status of sound broader moral rules. Some rules of legal ethics may, even where not clearly overridden by broader moral rules, nonetheless fail what may be called the test of promoting sound character.

## II. RELEVANT RULES OF CONTEMPORARY LEGAL ETHICS

The legal establishment does not, of course, concede the broader immorality of any common patterns of attorney conduct mandated or authorized by relevant codes of legal ethics. The attorneys' focus on the

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<sup>18</sup> See, e.g., JOHN D. BARROW, *THE ORIGIN OF THE UNIVERSE* 88-89 (1994); MICHAEL LOCKWOOD, *MIND, BRAIN, AND THE QUANTUM* 286-87 (1989).

<sup>19</sup> See *infra* notes 36-80 and accompanying text.

<sup>20</sup> See *infra* notes 21-35 and accompanying text; see also *supra* notes 2-10 and accompanying text (reviewing the legal ethical problems).

<sup>21</sup> See *infra* part V.

<sup>22</sup> See *infra* notes 125-30 and accompanying text.

interests of their clients may strike some outsiders as excessive. However, the legal establishment may respond that, in a properly functioning adversary system, what outsiders see as immoral behavior (as in the two cross-examination scenarios introduced above)<sup>23</sup> may be necessary to achieve important moral goods, including justice for more litigants,<sup>24</sup> regardless of whether such a result is intended by the attorneys.

Let us consider, then, the prohibitions and permissions of the current edition of the American Bar Association's *Model Rules of Professional Conduct* most directly relevant to the two cross-examination scenarios. To begin with, the preamble of the *Model Rules* sets the tone in observing, if not requiring, that "as advocate, a lawyer [should] zealously assert[ ] the client's position under the rules of the adversary system."<sup>25</sup> The preamble continues to the effect that "a lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."<sup>26</sup> The problem with this and similar language, though, is that such may authorize harassment or intimidation where those tactics are reasonably thought to genuinely serve the interests of the client, as opposed to harassment or intimidation that is merely gratuitous.<sup>27</sup> Presumably, tactics involving harassment or intimidation may tend, more or less plausibly, to have some meaningful relation to the client's interests and thus be justified under the *Model Rules*.

The adversary ethos, in our context, begins with the uncontroversial assumption that "cross-examination . . . is a probing, prying, pressing

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<sup>23</sup> See *supra* notes 2-10 and accompanying text.

<sup>24</sup> For a statement, without endorsement, of such an approach, see, e.g., Wasserstrom, *supra* note 1, at 30.

<sup>25</sup> MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1993); see also *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 324 (1985) ("[L]awyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views.") (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 787-88 (1973)).

<sup>26</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Preamble.

<sup>27</sup> See, e.g., ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 95 (1980) (noting that under a prior Model Code of Professional Responsibility, the advocate "is not to degrade witnesses by *irrelevant* questions, but can (and perhaps must) degrade them if it is helpful to his client's cause"); see also Stephen Gillers, *Can a Good Lawyer Be a Bad Person?*, 84 MICH. L. REV. 1011, 1021 n.24 (1986) (interpreting MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4, as forbidding the use of tactics with "no *substantial* purpose other than to embarrass, delay, or burden a third person"). More broadly, see Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 600-02 (1985) (discussing the ABA's approach to the adversary system).



form of inquiry."<sup>28</sup> However, even the most abusive, deceptive, or misleading cross-examinations need not involve any false representations of fact or be otherwise groundless under the *Model Rules*.<sup>29</sup> In fact, conduct that could well be considered morally unjustified outside the adversary context is commonly thought permissible, if not mandatory, within it. Judge Henry Friendly has been quoted by a plurality of the U.S. Supreme Court to the effect that "[w]ithin the limits of professional propriety," it may be the advocate's professional right or duty to "sow[ ] confusion."<sup>30</sup> Similarly, within some limits, the attorney "will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth . . . ."<sup>31</sup>

Thus if the cross-examiner, particularly in criminal cases, "can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course."<sup>32</sup> As Judge Jerome Frank observed:

[A]n experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. The lawyer considers it his duty to create a false impression, if he can, of any witness who gives such testimony.<sup>33</sup>

Given the premise that the cross-examiner is reasonably certain that the witness is providing accurate testimony, the observed or recommended strategy on cross-examination, consistent with legal ethics, is to engage in harassing, misleading, or deceptive questioning.<sup>34</sup> Of course, many broader ethical traditions generally object to such conduct. However, current legal ethics seek to defend such practices as conducive to, if not necessary for, some good state of affairs, such as a just outcome or the

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<sup>28</sup> *Bronston v. United States*, 409 U.S. 352, 358 (1973) (holding that a literally true, unresponsive answer should be remedied by cross-examination, not by contempt).

<sup>29</sup> See Gillers, *supra* note 27, at 1021 n.24.

<sup>30</sup> *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 325-26 (1985) (quoting Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1287 (1975)).

<sup>31</sup> *United States v. Wade*, 388 U.S. 218, 258 (1967) (White, J., dissenting in part and concurring in part).

<sup>32</sup> *Id.* at 257 (White, J., dissenting in part and concurring in part).

<sup>33</sup> JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 82 (1973), *quoted in part in Wade*, 388 U.S. at 257 n.6 (White, J., dissenting in part and concurring in part).

<sup>34</sup> See *supra* notes 27-33 and accompanying text.

effective operation of an adversary system thought superior to others in arriving at the truth or in producing just outcomes.

In these respects, the defenses of our current legal ethics and of the adversary system shall be considered.<sup>35</sup> First, though, the nature of the traditional broad ethical objections to abusive or misleading conduct, even when engaged in to further some asserted morally important goal, must be examined.

### III. TRADITIONAL ETHICAL OBJECTIONS TO ENGAGING IN ABUSE AND DECEPTION FOR THE SAKE OF A GOOD RESULT

A number of broad ethical traditions cast doubt on the legitimacy of engaging in abuse and deception for the sake of some good result. In the Kantian tradition, one must treat all rational persons with respect and dignity and as ends in themselves, rather than as merely a means to some desirable goal.<sup>36</sup> This tradition requires the avoidance of outright lying, even for the sake of great benefits.<sup>37</sup> Kant, however, qualified this rule to a certain extent. He concluded that "[t]he forcing of a statement from me under conditions which convince me that improper use would be made of it is the only case in which I can be justified in telling a white lie."<sup>38</sup>

An attorney lying on behalf of a client may try to defend such action by analogy to the presumed inclination to lie on behalf of one's spouse.<sup>39</sup> And it can be argued that the good consequences of some lies could include more truth-telling, or fewer lies, in the future. The crucial issue under legal ethics codes and in our two scenarios, however, does not involve outright lying, but abuse and deception.

Kantian theory requires respect for other persons.<sup>40</sup> It seems clear that for Kant such respect requires "that we avoid contempt, mockery, disdain,

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<sup>35</sup> See *infra* notes 81-112 and accompanying text.

<sup>36</sup> See, e.g., Immanuel Kant, *Metaphysical Foundations of Morals*, in *THE PHILOSOPHY OF KANT* 140, 177-78 (Carl J. Friedrich ed. & trans., 1949).

<sup>37</sup> See, e.g., ROGER J. SULLIVAN, *IMMANUEL KANT'S MORAL THEORY* 171 (1991).

<sup>38</sup> IMMANUEL KANT, *LECTURES ON ETHICS* 228 (Louis Infield trans., Hackett Publishing 1963) (1930); see also SULLIVAN, *supra* note 37, at 173 (discussing Kant's theories).

<sup>39</sup> See Curtis, *supra* note 6, at 8.

<sup>40</sup> See *supra* note 36 and accompanying text; see also PATRICK RILEY, *WILL AND POLITICAL LEGITIMACY* 128-29 (1982) (discussing how Kant ranks morality above legality); Albert R. Dilanni, *The Direct/Indirect Distinction in Morals*, 41 *THOMIST* 350, 377 (1977) (explaining that the murder of an innocent is wrong because it violates the person's dignity); Stephen Theron, *Two Criticisms of Double Effect*, 58 *NEW SCHOLASTICISM* 67, 67 (1984) (discussing the Kantian principle of treating humanity as an end rather than merely a means).

detraction and the like . . . ."<sup>41</sup> On its face, this principle would seem to encompass our cases of abuse and perhaps even deception upon cross-examination. No obvious Kantian grounds exist for an exception referring to the cross-examiner's officially designated role within the institution of the adversarial trial.

Some sort of contradiction may be involved in some respect in deceiving a jury.<sup>42</sup> A juror, for example, who is deceived on some point cannot, presumably, at the same time and in that very same respect deceive either the attorney or any other juror. But one might well wonder why this particular form of contradiction marks the presence of an immoral act. The cross-examiner might agree with Kant that deception generally impairs the purpose or value of communication, in a loosely self-contradictory way.<sup>43</sup> But this finding hardly ends the story. Might some instances of deception, perhaps committed by our cross-examiner, be necessary to lead the jury to a larger and more important legal truth and thus crucially facilitate the purpose of trial communication? Might a reasonable jury be imagined to consent to its own deception in just such cases?

It is hardly objectionable that the adversary system should, in its operation, treat all persons with dignity and respect.<sup>44</sup> It is possible to argue the adversary system, in general, does precisely that.<sup>45</sup> Even so, an issue of severability remains. Assuming it could be shown that the adversary system in general promotes and embodies respect and dignity, it would still be doubtful that abuse or deception by attorneys embodies that respect and dignity. It is also doubtful that such abuse or deception is genuinely inseparable from the morally valuable operation of the adversary system in general, or that to restrict attorney abuse and deception would, in practice, impair that moral value.

It is possible to conclude at this point that a Kantian critique of attorney abuse of witnesses or deception of jurors may be developed, despite the permission or mandate of our codes of legal ethics to engage

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<sup>41</sup> ONORA O'NEILL, *CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY* 115 (1989).

<sup>42</sup> See generally SULLIVAN, *supra* note 37, at 170-73 (discussing Kant's theories).

<sup>43</sup> See *id.* at 170-71.

<sup>44</sup> See, e.g., Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER*, *supra* note 1, at 123, 146; Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, in *THE GOOD LAWYER*, *supra* note 1, at 38, 46.

<sup>45</sup> See, e.g., Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1057 n.68 (1975); Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 548.

in such practices. Such a critique may not be decisive, though, at least where an attorney can point to some important moral good, including insight into the truth, obtainable only through deception.<sup>46</sup>

Let us turn, then, to a related broad ethical tradition that also generally bars abuse or deception even for the sake of a morally attractive outcome. This approach, the value of which has been endorsed by noted contemporary ethicists such as Professor Thomas Nagel,<sup>47</sup> is commonly referred to as the principle of double effect. This view holds that an important moral distinction exists between harm to others that is intended, either as an end or as a means to some good result, and harm that is foreseeable or predictable but is not intended by the actor, occurring instead merely as a side effect of what the actor does intend. Professor Gilbert Harman concisely states the view:

[W]hile it is an objection to a proposed course of action that it will harm someone, the objection is considerably more weighty if the harm is intended, either as one's aim or as a means to achieving one's end, than if the harm is merely foreseen as a side effect of one's action.<sup>48</sup>

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<sup>46</sup> Plato recommended, for example, that children be told "that no one has ever had a quarrel with a fellow citizen," presumably for the sake of reducing future quarrels, and, more interestingly, for the sake of aiding the overall moral character development of the child — a goal that our cross-examiner may find difficult to assert in parallel. THE REPUBLIC OF PLATO, BOOK TWO 70 (F.M. Cornford trans., 1945).

<sup>47</sup> See THOMAS NAGEL, THE VIEW FROM NOWHERE 179 (1986); see also Thomas Nagel, *War and Massacre*, in CONSEQUENTIALISM AND ITS CRITICS 51, 58 (Samuel Scheffler ed., 1988).

<sup>48</sup> Gilbert Harman, *Explaining Value*, in CULTURAL PLURALISM AND MORAL KNOWLEDGE 229, 242 (Ellen F. Paul et al. eds., 1994). For a selection of alternative formulations, see, e.g., CHARLES FRIED, RIGHT AND WRONG 21-22 (1978) (describing how certain bad results can be tolerated if they are viewed as "the foreseen concomitants of one's chosen means or ends"); Joseph M. Boyle, Jr., *Who Is Entitled to Double Effect?*, 16 J. MED. & PHIL. 475, 475 (1991) (explaining that a result can be permissible as a side effect of a particular action); John M. Fischer et al., *Quinn on Double Effect: The Problem of "Closeness"*, 103 ETHICS 707, 707 (1993) (discussing reasons not to pursue a good when the harm is an intended means instead of only foreseen); Frances M. Kamm, *The Doctrine of Double Effect: Reflections on Theoretical and Practical Issues*, 16 J. MED. & PHIL. 571, 571 (1991) (explaining that a bad side effect of an action is permissible if it is outweighed by the good produced by such action); and Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334, 335 (1989) (exploring the crucial implication that "the pursuit of a good tends to be less acceptable when a resulting harm is intended as a means than where it is merely foreseen"). The principle is sometimes said to prohibit "direct" or "directly willed" as opposed to "indirect" harms. See, e.g., FRIED, *supra*, at 21-22; Dilanni, *supra* note 40, at 351 (distinguishing between direct and indirect harms); Locke, *supra* note 13,

The principle is often conjoined to the further requirement that the act in question must not be itself morally wrong, aside from the morality of its consequences or effects.<sup>49</sup> In any event, it can certainly be plausibly argued that our cases of abuse and deception through cross-examination may ordinarily call into play the principle of double effect.<sup>50</sup>

This discussion does not suggest that the principle of double effect or its application is clear and unproblematic. It seems clear that one can indeed intend something as a means, rather than as an end in itself.<sup>51</sup> Thus, it is perfectly possible for our cross-examiner to intend abuse and deception as a means to some further desired goal, such as the acquittal of the client. Those versions of the principle that rely upon the idea of the moral quality of an act or intention by itself, apart from its effects or consequences, introduce an initial problem. Despite the familiarity of the idea,<sup>52</sup> it is far from clear that we can, or would want to, assess the morality of an act or intention apart from any intended, likely, foreseeable, or actual consequences.

We may admittedly want to morally blame a cross-examiner who intends abuse or deception even if no actual abuse or deception happens to occur. Suppose that the attorney misphrases a question that was intended to be, and to be perceived by the witness as, abusive,<sup>53</sup> or that the attorney's attempt to deceive or mislead the jury through cross-

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at 470 (distinguishing between direct and indirect killings). This usage seems unnecessarily misleading, in that one can clearly intend something to occur as the last, indirect link in a chain of causes and effects.

<sup>49</sup> See, e.g., James G. Hanink, *Some Light on Double Effect*, 37 ANALYSIS 147, 150 (1975); James F. Keenan, *The Function of the Principle of Double Effect*, 54 THEOLOGICAL STUD. 294, 300 (1993).

<sup>50</sup> See Fischer et al., *supra* note 48, at 707, 712 (discussing a purported "right not to be deceived").

<sup>51</sup> See, e.g., Anthony Kenny, *Intention and Purpose*, 63 J. PHIL. 642, 647 (1966); Kwong-Loi Shum, *Intending as a Means*, 66 PAC. PHIL. Q. 216, 221 (1985).

<sup>52</sup> See, e.g., Dilanni, *supra* note 40, at 350; Raymond G. Frey, *Some Aspects to the Doctrine of Double Effect*, 5 CAN. J. PHIL. 259, 259 (1975) ("The act to be done, considered in itself and apart from its consequences, must not be intrinsically wrong."); James F. Keenan, *Taking Aim at the Principle of Double Effect: Reply to Khatchadourian*, 28 INT'L PHIL. Q. 201, 201 (1988) (arguing against the principle of double effect); Donald B. Marquis, *Some Difficulties with Double Effect*, 9 SW. J. PHIL. 27, 27 (1978) (referring to the idea that some acts "are bad in themselves — that is, independently of the consequences produced by them").

<sup>53</sup> One might argue that nobody ever strictly intends abuse or deception; our cross-examiner intends only to say or do things that are commonly thought of, or thought of by the witness, as abusive or deceptive. While this point may need developing in some contexts, it is inconsequential for the purposes of this Article.

examination is transparent and fails miserably. While we might want to blame the attorney and prohibit such conduct, even though no bad consequences actually resulted, it is not obvious why we would take the trouble to prohibit such conduct. The idea of an action apart from any consequences at all may not even be coherent, as some exponents of the principle of double effect recognize.<sup>54</sup>

Another possible problem may also be considered. The principle of double effect has often been associated historically with absolutism in ethics — the idea of universal, exceptionless moral rules.<sup>55</sup> Absolutism in this sense would undesirably direct that a moral rule against deception should be followed even if one knew that an act of deception would be necessary to prevent some catastrophic moral horror.<sup>56</sup>

Such moral absolutism is not required by the principle of double effect as it has been stated.<sup>57</sup> Certainly, one must not intend a moral wrong, as a means or end, but this does not imply any theory of why the act or intention is morally wrong. Perhaps abuse and deception are always morally wrong, wherever and whenever practiced, regardless of the circumstances. An attorney's abuse or deception might equally be called wrong because, for example, some group has agreed that for the relevant time period, one form of abuse or deception on cross-examination of a particular witness violates a narrow moral rule barring just such conduct.

The principle of double effect faces other challenges, however. Most obviously, the principle requires some sort of practically usable distinction between what the actor intends and what the actor foresees without intent. But this is a slippery distinction, as we know from the law's frequent willingness to infer that actors intend the natural, probable, or foreseeable consequences of their acts.<sup>58</sup> Further, it is difficult to believe that any socially imbedded act, such as a cross-examination, will normally have only one legitimate description, to the exclusion of other ways of describing that act.<sup>59</sup>

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<sup>54</sup> See, e.g., Joseph M. Boyle, Jr., *Toward an Understanding of the Principle of Double Effect*, 90 ETHICS 527, 532 (1980); see also T.M. Scanlon, *Rights, Goals, and Fairness*, in CONSEQUENTIALISM AND ITS CRITICS, *supra* note 47, at 73, 74 ("Unless rights are to be taken as defined by rather implausible rigid formulae, it seems that we must invoke what looks very much like the consideration of consequences in order to determine what they rule out and what they allow.").

<sup>55</sup> See, e.g., Marquis, *supra* note 52, at 33.

<sup>56</sup> See SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 86 (1982).

<sup>57</sup> See Boyle, *supra* note 54, at 537; Boyle, *supra* note 48, at 481.

<sup>58</sup> See, e.g., Kenny, *supra* note 51, at 642.

<sup>59</sup> See Phillip E. Devine, *The Principle of Double Effect*, 19 AM. J. JURIS. 44, 48 (1975).

For example, some acts of apparently intentional killing may be redescribed as acts of intended self-defense.<sup>60</sup> Is the death in such cases a mere predictable side effect and never a presumably strongly regretted but necessary means to the end of saving one's own life? Is a soldier's decision to jump on a live grenade only an act of saving one's comrades and not, under an equally valid description, a noble or self-sacrificing intentional suicide?<sup>61</sup> Why not re-characterize our cross-examiner's abusive or deceptive language as merely an attempt to arrive at justice or a more crucial truth in perhaps the only way possible?<sup>62</sup>

However, limits exist to the extent to which acts and intentions can be redescribed.<sup>63</sup> Typically, revelers foresee, but do not intend, the resulting hangover.<sup>64</sup> In applying a car's brakes, one similarly does not normally intend to wear down those brakes.<sup>65</sup> Consequences that are chosen as a means to some further goal cannot invariably be plausibly redescribed as unintended and merely foreseen. Certainly this is true in our cross-examination scenarios. Inescapably, attorneys choose to engage in abuse or deception in those contexts precisely because they think such conduct will lead causally to some desired end; thus, they select such conduct as a means.

It might then be argued, though, that even if the distinction between intention and mere foresight is clear enough in our cross-examination cases, it is often not morally significant, even if we attend to only the cross-examiner's state of mind. Intending and foreseeing, it may be said, tell us little about whether what is intended or foreseen is, for example,

<sup>60</sup> See ALAN DONAGAN, *THE THEORY OF MORALITY* 160 (1977).

<sup>61</sup> For discussion of these issues, see R.A. Duff, *Absolute Principles and Double Effect*, 36 *ANALYSIS* 68, 78 (1976); and Hanink, *supra* note 49, at 151.

<sup>62</sup> For further discussion of this problem, see, e.g., Nancy Davis, *The Doctrine of Double Effect: Problems of Interpretation*, 65 *PAC. PHIL. Q.* 107, 114 (1984); and Suzanne M. Uniacke, *The Doctrine of Double Effect*, 48 *THOMIST* 188, 199 (1984). See also Sanford S. Levy, *The Principle of Double Effect*, 20 *J. VALUE INQUIRY* 29, 38 (1986) (describing side effects as part of an overall plan).

<sup>63</sup> See Theron, *supra* note 40, at 76.

<sup>64</sup> See Kenny, *supra* note 51, at 644.

<sup>65</sup> Clearly, in at least some sense, drivers who apply their brakes do not, for example, intend to hasten the day on which their brakes will require costly replacement. See Robert Hoffman, *Intention, Double Effect, and Single Result*, 44 *PHIL. & PHENOM. RES.* 389, 390 (1984) (explaining that one does not usually sprinkle one's pepper with the intent to decrease one's stock); Marquis, *supra* note 52, at 28-29 (explaining that a shopper does not intend to purchase the costliest item in the store, even if she intends to purchase the item answering that description). But see Antony Duff, *Intention, Responsibility and Double Effect*, 32 *PHIL. Q.* 1, 3 (1982) (discussing an attempt to distinguish between purposive and non-purposive intentions).

bitterly regretted or anticipated with ghoulish relish. Our cross-examiner may be genuinely pained by the cross-examinations. Certainly, the actor need not desire an intended means for its own sake as well;<sup>66</sup> the actor may sincerely regret its necessity. On the other hand, while foresight need not involve any desire that the foreseen event occur,<sup>67</sup> an unintended but foreseen side effect might be anticipated with fiendish delight.<sup>68</sup>

The fact that one intends a result merely as a means is still morally significant in our context. Our cross-examiner presumably considered the relevant moral principles and consciously chose to abuse or mislead the witness or jury for the sake of some goal. The cross-examiner presumably could have done otherwise, whether or not these tactics were sincerely regretted. The possibility of a less abusive or misleading cross-examination was available but rejected; attempts by such attorneys to avoid full moral responsibility thus seem unpersuasive.

This discussion does not suggest that an attorney who relishes such cross-examinations is in this respect morally equivalent to an attorney who regrets them, even if their methods of cross-examination are identical. But the distinction between intent and mere foresight does not become trivial in our contexts. Related questions of character are considered below.<sup>69</sup> However, the scenario of the "roommate choice" may provide insight at this juncture.

Suppose that person *A* needs a roommate. The details of *A*'s circumstances may vary widely. Suppose further that *A* is confronted with a choice between potential roommates *B* and *C*. As it turns out, *B* and *C* are in most relevant respects identical. As it also turns out, *B*'s work typically involves actions with no *intended* harms, but *B* does *foresee* harms of a certain degree of severity. However, *C*'s work typically involves harms that *C* actually *intends*, as an end or means, of the same degree of severity of consequences as those inflicted without intent by *B*. Additionally, *A* knows nothing about whether they relish or regret the harms involved in their work and knows nothing about the degree of positive good done by *B* or *C*.

Now if *A* wishes to choose reasonably between *B* and *C*, protecting optimally *A*'s own basic interests, must *A* conclude that the choice

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<sup>66</sup> See, e.g., FRIED, *supra* note 48, at 23.

<sup>67</sup> See Boyle, *supra* note 54, at 535-36; Norvin Richards, *Double Effect and Moral Character*, 93 MIND 381, 388-89 (1984).

<sup>68</sup> Failing to prevent an unintended but foreseen event may, in some cases, bespeak a horrifying moral indifference. See SHELLY KAGAN, *THE LIMITS OF MORALITY* 170 (1989).

<sup>69</sup> See *infra* notes 113-24 and accompanying text.



between *B* and *C* is utterly arbitrary and that the choice of *B* or *C* is apparently equally risky? In fact, though, *A* does have at least some minimal, if not entirely satisfactory, basis for reasonably preferring *B*. Intention, or a stable pattern of repeated intention over time, seems to matter, practically and morally, largely because it more directly and reliably suggests what may be called character.<sup>70</sup>

This example is not designed to minimize the complexities of the moral evaluations we must make of prospective roommates, or of attorneys. We may, for example, tend over time to become desensitized to harms we do not intend, as well as to harms we do intend. Or our cross-examiner might, while still intending abuse or deception, nonetheless be able to focus her own subjective attention during the cross-examination on the good she hopes to obtain and not on the abuse or deception. Some might argue that such an ability reduces any ill effects on one's character of intending harm; others might demur.

Finally, our cross-examiner might argue that she really should not be morally taxed with abuse or deception, as she would be well pleased if some route to an equally high probability of justice or acquittal that did not require abuse or deception were available. If, by some fluke or miracle, the intended abuse did not turn out to be genuinely abusive of the witness, or if the attempt at deception failed completely but the jury nevertheless decided the case appropriately, our cross-examiner might not be disappointed.<sup>71</sup>

This claim, though, shows only that our cross-examiner does not value abuse or deception as an end in itself. The cross-examiners cannot dissociate themselves from their choice of means to an end by envisioning a world in which they could somehow attain that end without a deceptive or abusive intent. Attorneys who intend abuse or deception do

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<sup>70</sup> Of course, considerations other than character may be relevant to the roommate choice problem. Some may argue, for example, that intending that someone *not* receive some good is worse than acting without any intention, because the former is a graver and more direct violation of a duty to will good for other people. See, e.g., Jorge L.A. Garcia, *The New Critique of Anti-Consequentialist Moral Theory*, 71 PHIL. STUD. 1, 6 (1993). If we loosen the stipulations built into the roommate choice problem, we might come to believe that, despite our proclivity for bungling, bad outcomes are generally more likely to occur if they are intended and not merely foreseen. See Kenny, *supra* note 51, at 650.

<sup>71</sup> For discussion of the possible relevance of scenarios in which an actor is pleased with a desired outcome despite the failure of the means chosen to obtain that outcome, see Devine, *supra* note 59, at 54-55; Alan Donagan, *Moral Absolutism and the Double Effect Exception: Reflections on Joseph Boyle's Who Is Entitled to Double Effect?*, 16 J. MED. & PHIL. 495, 496 (1991); Frey, *supra* note 52, at 263-64; and Uniake, *supra* note 62, at 208-09.

not reasonably expect that their cross-examinations will somehow turn out not to be abusive or deceptive. And again, this fact seems important because we do not normally consider a merely idle, abstract preference for getting what one wants without immorality to be a significant mark of good character.

At this point, it can be concluded that in the context of this Article, the principle of double effect, with its emphasis on a moral distinction between intent and mere foresight, has some coherence, relevance, and force. One significant unresolved problem with the principle, though, is the possibility that a minor violation of the principle could have substantial moral payoffs. Cross-examinations that just barely breach some moral rule against intentional harm might be reasonably necessary to obtain an important moral good. An important moral payoff, such as justice for the client or the proper functioning of a necessary component of an otherwise moral litigation system, may seem to justify some degree of intentional injury. We might well prefer some minimally wrongful intent, if necessary for an important moral result, to an intent to avoid harm in the course of obtaining only a grossly morally unattractive outcome.

Thus the principle of double effect must, in the context of our cross-examinations, confront the possible desirability of crossing a moral line. But here, it is important to distinguish between our two cross-examination scenarios. The case of abusive cross-examination of a rape victim less readily lends itself to considerations of an achievable good sufficient to justify some degree of abuse. This is so even if the intent only barely crosses the relevant moral line and the actual effect on the victim is small by comparison with what other rape victims may face on cross-examination. Some moral rules are more serious than others. Obvious issues of inequality and social justice for victims in such cases are simply not paralleled in the merely deceptive cross-examination cases. In particular, it is difficult to imagine how any degree of abuse of a rape victim on cross-examination could benefit women, or future rape victims, in general.

But in this context, the principle of double effect faces a special problem, the real significance of the moral distinction between intended and unintended, even unforeseen, harms. It may generally be true that intended harm is, in the abstract, morally worse than unintended or unrecognized harm.<sup>72</sup> But in the particular context of the cross-examination of rape victims, unintended but reasonably foreseeable harms may

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<sup>72</sup> See *supra* note 70 and accompanying text.

actually be as morally serious as intended harms.<sup>73</sup> It is perfectly reasonable to find a prosecutor's obtuseness and insensitivity in this context to be equally, if not more galling or frustrating than even some borderline degree of intentional abuse, given the substantial efforts to educate those involved in the criminal justice system to be more alert to such presumably unintended harms. Pervasive, continuing, and malign indifference may be as disrespectful as some degree of intentional injury.

The principle of double effect need not utterly discount unintended harms. But it does not seem by itself a suitable vehicle to assess the morality of unintentional and intentional harmful cross-examination of rape victims. Again, part of the solution involves a greater concern for character.<sup>74</sup> To remain grossly insensitive to, unaware of, or indifferent to patterns of one's own unintended injuries to rape victims, despite decades of relevant publicity and the debunking of stereotypes, is, among other things, indicative of bad character.

If we expand our focus beyond our two cross-examination scenarios, it is possible to cast further doubt on the adequacy of the double effect principle in the litigation context. In an especially interesting passage, Professor David Luban has characterized a common understanding of the American Civil Liberties Union's ("ACLU") litigation strategy as appealing for justification to the principle of double effect.<sup>75</sup> Under this view, the ACLU's real intent is to promote the Bill of Rights.<sup>76</sup> In some cases, promoting the interests of unsavory clients is said to be "an unfortunate but unavoidable by-product of advancing principles" to which the ACLU is committed.<sup>77</sup>

Here, two points must be made. First, the claim that the ACLU advances the interests of some unsavory clients only as an unintended by-product or side effect is not plausible. Certainly, if the ACLU could optimally promote the Bill of Rights without promoting the interests of their least attractive clients, they would be pleased. The ACLU may in fact regret promoting the interests of such parties. But such is not a test of intention. Given the nature of the causal chains involved, it is clear

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<sup>73</sup> For relevant examples and discussion, see, e.g., SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 372-73 (1975); and SUSAN ESTRICH, *REAL RAPE* 55-56 (1987).

<sup>74</sup> The author assumes at this point that most contemporary codes of ethical responsibility do not adequately prohibit or discourage attorneys' insensitivity or indifference to their assumedly unintentional injuries to testifying rape victims.

<sup>75</sup> See David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 *VAND. L. REV.* 717, 738-39 (1988).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 738.

that the ACLU promotes the interests of unsavory clients as a presumably necessary means to the intended end, the flourishing of civil liberties.<sup>78</sup> Promoting the interests of the unsavory, while not intended as an end in itself, is still intended as a means. Thus, if it is somehow morally wrong for the ACLU to intentionally promote the interests of the unsavory, the ACLU commits a wrong.

The second point to be made is that such a claim may impeach the principle of double effect more than it impeaches the morality of the ACLU. If we strongly value civil liberties and see no other way to promote civil liberties, then we may, as a matter of homespun moral balancing, determine that this large net payoff of moral good justifies the ACLU's use of presumably immoral means.

This last point reflects the difficulties that the principles of double effect and Kantianism have in a situation where committing a wrongful act will apparently result in a greater moral good, avoidance of disaster, or even fewer wrongful acts in the future. If one is convinced that a minimal lie will probably save many lives, then many would probably consider the lie to be morally justified.<sup>79</sup> Similarly, many persons would be inclined to accept intentional deception in the course of a cross-examination if that deception were necessary to, and likely to result in, the acquittal of a group of unjustly accused criminal defendants.<sup>80</sup> We are thus left with conflicting impulses regarding the rules of legal ethics and the justifiability of immoral means in litigation.

#### IV. ABUSE, DECEPTION, AND THE INSTITUTION OF THE ADVERSARY SYSTEM

Cross-examinations occur in an institutional context, with the participants occupying prescribed institutional roles within an adversary system. The adversary system itself is defined and limited by case law, statutes, relevant rules or codes of professional responsibility, and constitutional principles. We must ask, then, whether this institutional

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<sup>78</sup> *Id.* at 738-39.

<sup>79</sup> It is interesting to note that, while most codes of legal ethics do not fully respect obvious applications of the principle of double effect, they also do not build in general exceptions to rules against lying to the court in even extreme cases. Thus, for example, the *Model Rules* state flatly that lawyers "shall not knowingly . . . make a false statement of material fact or law to a tribunal." See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1).

<sup>80</sup> Issues of broader social justice are briefly considered later. See *infra* notes 124-30 and accompanying text.

context dissolves the problem of arguably immoral attorney conduct, as in our abuse and deception cases, that the rules of legal ethics permit.

It might be noted by analogy that many persons look upon private selfishness more benignly if convinced, like Bernard Mandeville<sup>81</sup> and Adam Smith,<sup>82</sup> that private selfishness, properly institutionalized within a functioning economic market, conduces to the public benefit, even in the absence of any intention to promote that public good. Operating within an authorized role in general can certainly make a difference.<sup>83</sup> We do not, for example, morally blame or legally condemn meter readers for what would otherwise be a trespass, or think of prison guards as kidnappers.

How much otherwise morally objectionable conduct by attorneys can be institutionally justified is a broad and controversial question.<sup>84</sup> But it seems clear that even the deeply institutionalized character of cross-examination cannot simply immunize all authorized conduct from moral scrutiny. Even if the attorney's role as an officer of the court tends to legitimize any authorized conduct by the attorney, that same role may itself suggest limits to adversary zeal even beyond those currently imposed by professional ethics codes.<sup>85</sup>

Thus, it is quite possible to conclude that the institutionally required and permitted conduct of the cross-examiner should, in some respects, be changed for moral reasons.<sup>86</sup> It is also fair to conclude that individual attorneys share in the appropriate moral blame for actions currently

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<sup>81</sup> See BERNARD MANDEVILLE, *THE FABLE OF THE BEES; OR, PRIVATE VICES, PUBLIC BENEFITS* (Irwin Primer ed., 1962).

<sup>82</sup> See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS*, Book Four 423 (Edwin Cannan ed., 1937). But see GOLDMAN, *supra* note 27, at 143-44 (providing a skeptical response to the purported analogy between the workings of the adversary system and the economic market's invisible hand); Patricia L. Rizzo, *Morals For Home, Morals For Office: The Double Life of a Civil Litigator*, 35 CATH. LAW. 79 (1991) (discussing the tension between professional ethics and personal morals).

<sup>83</sup> See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 128 (1988) (discussing duties "essential to the proper functioning of the role").

<sup>84</sup> See, e.g., Schwartz, *supra* note 45, at 544; Paul L. Haines, Note, *Restraining the Overly Zealous Advocate: Time For Judicial Intervention*, 65 IND. L.J. 445, 452 (1990).

<sup>85</sup> See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 153 (1993).

<sup>86</sup> See, e.g., LUBAN, *supra* note 83, at 129 (stating justification of the role in terms of contribution to the role's end); Michael O. Hardimon, *Role Obligations*, 91 J. PHIL. 333, 348 (1994) (stating that it is still possible to step back from institutional moral norms to assess their rational acceptability).

authorized within the institution of cross-examination.<sup>87</sup> The main concern, of course, is not with deciding whether or how much to blame our cross-examiner, but with the moral status of the cross-examination itself. It is important to bear in mind that the issue is not whether cross-examination, broadly and in general, is a good or useful institution. Instead, issues of the practical severability of immoral excesses arise.

Thus, even if attorney advocacy in general is morally justified, zealous advocacy in particular or some extreme forms and degrees of zealous advocacy may not be justified.<sup>88</sup> Particular objectionable practices may be readily severable from a broadly morally justifiable institution. Excesses may be safely trimmed away.

The possibility of severability allows us to bypass any claim that restricting abusive or deceptive cross-examination, however otherwise desirable, would violate the U.S. Constitution. It is certainly possible to argue that the Constitution, with its emphasis on the rights to due process, a jury trial, compulsory process, and confrontation, implies something suggestive of an adversary system.<sup>89</sup> It is, however, utterly implausible to argue that any adversary system in which abusive or deceptive cross-examinations were ethically barred would unconstitutionally abridge the rights of litigants.

Defenders of current legal ethics codes might question the practical assumptions underlying our proposed restrictions on abusive and deceptive cross-examination. In particular, truth may be a distinctive outcome of the adversary system, such as through vigorous cross-examination.<sup>90</sup> The cross-examiner may not know all relevant truths

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<sup>87</sup> See Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 89 (1980) ("[T]he lawyer, as well as the client, bears at least some responsibility for harms done by both 'institutional' and 'personal' actions.").

<sup>88</sup> See Amy Gutmann, *Can Virtue Be Taught to Lawyers?*, 45 STAN. L. REV. 1759, 1763 (1993) ("[Z]ealous advocacy does not justify certain tactics on behalf of one's clients (such as discrediting a plaintiff by raising irrelevant facts about her sexual history)."). Consider the possibility that the cross-examiner may wish to conduct an especially abusive cross-examination of a rape victim within the rules and not necessarily at the expense of the client's interest. This course might be chosen, for example, if the cross-examiner strategically wishes to establish a reputation within the legal community that will deter or intimidate future rape victims from complaining. For a discussion of this broad strategic phenomenon in a different context, see Janet C. Alexander, *Do the Merits Matter?: A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 532-33 (1991).

<sup>89</sup> See, e.g., Jay S. Silver, *Professionalism and the Hidden Assault on the Adversarial Process*, 55 OHIO ST. L.J. 855, 858-60 (1994); see also Haines, *supra* note 84, at 449 (discussing the Fifth, Sixth, Seventh, and Fourteenth Amendments).

<sup>90</sup> See, e.g., Frankel, *supra* note 45, at 1036-37; Monroe H. Freedman, *Judge*

before or during the cross-examination process and may often be unsure of the validity of the testimony she seeks to cross-examine.

Admittedly, the cross-examiner may be in a position only to speculate with regard to relevant truth or falsity,<sup>91</sup> in which case our critique of the deception would be unfounded. Now, it may be possible for a cross-examiner to plunge into an abyss of radical doubt and to invariably profess uncertainty regarding some crucial fact. But this position is not necessarily credible. Sometimes the lawyer will know relevant facts securely enough.<sup>92</sup> The client may, for example, admit to the attorney to having been at a given place at a given time. If so, it is hardly reasonable to cross-examine a witness on that point while presuming that the truth of the matter is obscure.

It might be argued that, in the context of this Article, the attorney's knowledge of the truth is actually irrelevant. Perhaps the attorney should not presume to know the truth, as that would be arrogating to oneself a function assigned to the trier of law or fact.<sup>93</sup> But this is, again, to assume that in our context, invoking the privileges and responsibilities of one's institutional role bars any deeper moral challenge to one's actions.<sup>94</sup> An attorney's pretended ignorance must always be morally justified. Even the established legal ethics codes in some circumstances bar attorneys from professing ignorance or uncertainty when they in fact know the truth.<sup>95</sup>

What, though, of the argument that the attorney may know certain information only because the client has confided in that attorney under a promise of confidentiality and fiduciary loyalty? Surely attorneys should not generally go about their business in ignorance of basic relevant

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*Frankel's Search For Truth*, 123 U. PA. L. REV. 1060, 1060-61 (1975); Silver, *supra* note 89, at 883-85. For the view that truth in the context of adjudication is not discovered or ascertained so much as created, performed, or practiced, see Milner S. Ball, Comment, *Wrong Experiment, Wrong Result: An Appreciatively Critical Response to Schwartz*, 1983 AM. B. FOUND. RES. J. 565, 570.

<sup>91</sup> For discussion, see Rhode, *supra* note 5, at 32; and Donald T. Weckstein, Comment, *The Civil Advocate and the Multifaceted Functions of Dispute Settlement — Some Domestic and Cross-Cultural Perspectives*, 1983 AM. B. FOUND. RES. J. 577, 581 ("[A] postevent inquiry is probably incapable of ever reconstructing the whole truth.").

<sup>92</sup> See, e.g., Curtis, *supra* note 6, at 14.

<sup>93</sup> See *id.*; Schwartz, *supra* note 45, at 552.

<sup>94</sup> See *supra* notes 88-92 and accompanying text.

<sup>95</sup> See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (barring, for example, false statements of material fact by an attorney to a judge and evidence known by the attorney to be false); *id.* Rule 3.4 (barring assistance to a witness testifying falsely).

facts.<sup>96</sup> Clients, who may be the best or only source of such facts, currently may rely in most cases upon the attorney's promise of undivided loyalty.<sup>97</sup> For the lawyer to limit a cross-examination based upon information disclosed in confidence by the client would thus betray the client's trust and impair the workings of the adversary system.<sup>98</sup>

These considerations are, however, ultimately not of great concern. The existence of divided loyalties among professionals is neither uncommon nor invariably unattractive. We do not expect surgeons to broadly sacrifice the health interests of non-patients for those of patients, or, for example, to fail to report a patient's gunshot wounds even at the predictable expense of that patient's broader interests.<sup>99</sup> Both physicians<sup>100</sup> and attorneys<sup>101</sup> are expected under some specified circumstances to disclose patient or client statements made in confidence, even contrary to the patient's or the client's expressed wishes or interests.

The obvious way to minimize the direct costs of betrayed client confidences is for the attorney to specify in advance the limits of client confidentiality. The client cannot claim disloyalty or betrayal if the attorney has, in advance, explicitly held open the possibility of tailoring any future cross-examination in light of all that has been disclosed to that attorney.

Of course, such action might well lead to reduced client disclosures to the attorney, and in turn to the attorney's litigating the case on the basis of reduced information. But this unfortunate effect is not of overwhelming significance. Plainly, some relevant information is withheld from attorneys even with the current guarantees of relatively full confidentiality. And it is still in the client's interest to disclose some adverse information to the attorney even under a reduced scope of

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<sup>96</sup> See, e.g., Freedman, *supra* note 9, at 1473.

<sup>97</sup> See *id.* at 1474-75; see also SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 160 (1978) (discussing the rationale in favor of client confidentiality); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 30, 34-35 (discussing Freedman's argument on this point).

<sup>98</sup> See, e.g., Frankel, *supra* note 45, at 1056; see also GOLDMAN, *supra* note 27, at 110-11 (discussing cross-examination based on information gained in confidence).

<sup>99</sup> See, e.g., CAL. PENAL CODE § 11160 (West Supp. 1995); VT. STAT. ANN. tit. 13, § 4012 (1993).

<sup>100</sup> See, e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (1976) (holding that a psychotherapist, believing the patient to be a threat, must take steps to warn third parties, even if such belief was acquired through confidential communications).

<sup>101</sup> See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (barring an attorney's knowing failure to disclose a material fact to the court when necessary to prevent crime or fraud by the client).



confidentiality. The issue, after all, is the possible scope or nature of cross-examination, not the public disclosure of a client's private confession. Certainly, most limited or even foregone cross-examinations will not strike the jury as amounting to a confession of guilt.

No doubt cases will arise in which a client will unfortunately withhold information, perhaps on the false belief that such information is prejudicial or is not otherwise vital for the attorney to know. Cases will occur in which the opposing counsel will somehow become aware of the undisclosed information in question. But it is far from clear why either the Constitution or morality itself requires precisely the current kinds and degrees of confidentiality. Why should the judicial system offer clients precisely the current level of protection against the adverse consequences of, for example, a client's wrong guess as to whether to conceal a particular fact from his attorney? After all, correspondence between the client's best interests in this respect and a broader public interest is not necessary.

But the problem here is not simply one of balancing client and public interests, although that is certainly how issues in legal ethics are often envisioned. Consider, for example, the well-known thesis of Charles Fried that "it is not only legally but morally right that a lawyer adopt as his dominant purpose the furthering of his client's interests — that it is right that a professional put the interests of his client above some idea, however valid, of the collective interest."<sup>102</sup> If this inquiry becomes the sole one, however, the attorney may be unduly tempted to romantically exalt the individual, or the value of friendship with the client, above some mere vague public interest.

However, as this Article's cross-examination hypotheticals make clear, more than just generally diffused utility weighs against the current rules of cross-examination. Even if the value of protecting human dignity or autonomy counts generally in favor of some sort of adversary system,<sup>103</sup> why do human dignity or autonomy and the specific moral rights of witnesses or jurors not count against abusive or misleading cross-examination?<sup>104</sup> Acknowledging the possibility of a conflict between clients' rights or interests and the rights of other individuals would usefully open up the debate over legal ethical principles.<sup>105</sup>

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<sup>102</sup> Fried, *supra* note 1, at 1066.

<sup>103</sup> See Frankel, *supra* note 45, at 1056-57 & n.68.

<sup>104</sup> See Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 671 (1994); see also Haines, *supra* note 84, at 451 (discussing, without endorsing, the adversary system and its emphasis on client autonomy).

<sup>105</sup> While no consensus might emerge on the precise boundary between rights of

The possibility that witnesses and other persons might hold rights in conflict with the rights or interests of the clients might not amount to much if witnesses could fairly be said to typically waive such rights, as by consenting voluntarily to testify under certain knowable ground rules. Just as we might be said to democratically consent to an adversary system through our elected representatives,<sup>106</sup> so witnesses, including rape victims, might be said to consent to what predictably lies in store on the witness stand.<sup>107</sup>

An argument can be made that jurors actually, if tacitly or impliedly, consent to being misled by attorneys, at least for the sake of some presumed greater truth. After all, an attorney may know relevant facts a jury cannot, or so at least a jury might believe. It is even possible that some witnesses might consent to being cross-examined in a deliberately misleading way, at least for the sake of some greater truth known, securely, by the cross-examiner.

However, it is patently unreasonable to suppose that typical rape victims consent to what this Article has called abusive cross-examination. Presumably, a rape victim testifies out of a sense of painful and important obligation or to reduce the chances of serious crimes being perpetrated against others. The result of not testifying and thus not being subjected to abusive cross-examination would be failing to discharge that important obligation or enhancing the risk of future serious crimes against others. It is presumably impossible to negotiate for a more civilized cross-examination or to fulfill the purposes in testifying through some less distasteful third option.

Even if the rape victim witness thinks of testifying as a civic right or privilege, an analysis in terms of consent cannot justify otherwise morally objectionable cross-examination. For purposes of illustration, it may be said that while some sort of cross-examination is an inherent, inseparable part of testifying, abusive cross-examination is, in effect, a special cost or tax authoritatively imposed upon some or all persons who choose to testify. And in the analogous context of voting, one would ordinarily be quite suspicious of special taxes imposed upon some or all of those who seek to vote, especially if such a special tax or cost were predictably disproportionately burdensome to identifiable groups of persons otherwise qualified to vote.<sup>108</sup>

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clients and witnesses, considerations of character would further such discussions.

<sup>106</sup> See DAVID LUBAN, *THE GOOD LAWYER*, *supra* note 1, at 108 (discussing, without endorsing, such a view).

<sup>107</sup> For general discussion in a significantly different context, see Richards, *supra* note 67, at 387.

<sup>108</sup> See generally *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 663 (1966)

Undoubtedly, differences between voting and testifying in court as a rape victim exist.<sup>109</sup> The important point is that nobody would claim that persons who vote after paying a tax have lost the right to morally or legally object because they have "consented" to that tax. The legal system may choose to expand the idea of consent so as to conclude that rape victim witnesses somehow consent to any question permitted by statute, court rule, or relevant legal ethics codes. But such would merely settle the issue by fiat. One would want to know why this expansion of the idea of consent is morally, and not just legally, legitimate. And one would then note the disturbing possibility of a loose parallel between the legal system's finding implied consent in such cases and the many arguments propounded by rape defendants themselves in favor of finding consent in the underlying rape case.

At this point, it may fairly be concluded that our familiar adversary system, even as tempered by relevant rules of professional responsibility, tends in important situations to require or encourage what would often be thought of as morally unjustified conduct. But the rules of legal ethics commonly refer beyond the text of the rules themselves, to the judgments of one's peers as attorneys and to personal conscience, as guides.<sup>110</sup> Does this openness dissolve the moral problem? Plainly it does not.

The rules of legal ethics do not guarantee a satisfactory accommodation of the promptings of an enlightened conscience.<sup>111</sup> No broad conscience-based defense to violations of legal ethical rules exists. Accommodation of one's conscience might well take the form of gradually, unconsciously tailoring one's own conscience to fit the judgments of peers or the pragmatic demands of one's circumstances. The rules do not generally exalt attorney conscience over the interests or demands of the client.<sup>112</sup> In any event, violation of one's personal

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(striking down a fee or tax imposed prior to voting).

<sup>109</sup> For example, a payer of poll taxes ordinarily knows in advance the precise scope of the tax; however, with the rape victim, the degree of abuse the witness may be called upon to endure may vary widely, and the likely nature and degree of abuse may be utterly unknown to the prospective witness, thus undermining claims of consent. See RESTATEMENT (SECOND) OF TORTS § 892A (1977) (discussing limitations on the scope of consent in a tort defense context).

<sup>110</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Preamble ("[A] lawyer is also guided by personal conscience and the approbation of professional peers."). The preamble concludes, or supposes, that "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." *Id.*

<sup>111</sup> See, e.g., Richard A. Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975, 975 (1990).

<sup>112</sup> See, e.g., E. Wayne Thode, *The Ethical Standard for the Advocate*, 39 TEX. L.

conscience should not be the fundamental moral issue. Conscience can be fallible. We must be concerned about attorney conduct that may be morally defective, even though it is in accord with the attorney's conscience and with the collective conscience of professional peers.

#### V. INTENTIONS, OUTCOMES, AND THE MEDIATION OF CHARACTER

It is reasonable to call contemporary legal ethical principles into serious moral question in important contexts. This task has been undertaken, however, without fully addressing an underlying problem that has no easy solution. The general problem can be stated in a legal context as follows: often, it will seem morally right to follow a familiar, broad moral rule and refrain from engaging in even legally permissible abuse or deception on cross-examination, if the good consequences obtainable from such are small. If the payoff for violating a presumed broad moral rule while still acting within the rules of legal ethics is modest in terms of good outcomes, it may be concluded that, all things considered, it is morally wrong to push the legal ethics code toward its limits by engaging in conduct normally barred by the general, broad moral rules.

This loosely parallels the ordinary moral judgment that one should not lie, steal, or break a promise in order to obtain some small net increase in overall utility.<sup>113</sup> But what if the promised gain in utility is not small? What if, hypothetically, lying, stealing, or breaking a promise were clearly necessary to produce, with certainty, an enormously better balance of good over evil or to avoid some catastrophe? In the legal context, what if acts of at least minimally abusive or deceptive cross-examination were known, on some occasions, to be necessary to avoid an unjust conviction or to sustain an adjudicatory system that promises the least injustice, overall, to criminal defendants, witnesses, and the victims of crime? In such cases, many of us might be inclined to judge some intentional acts minimally violative of familiar moral rules to be morally permissible, at least subject to some sort of fairness constraints.

Our inclinations would thus be in some tension, depending upon the nature or magnitude of the payoff from limited violations of familiar moral rules. Of course, problems of certainty and of burden of proof may loom large, but such problems cannot undermine this disturbing problem in principle: at what precise point do the consequences of following a

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REV. 575, 595 (1961).

<sup>113</sup> See, e.g., Philippa Foot, *Utilitarianism and the Virtues*, in CONSEQUENTIALISM AND ITS CRITICS, *supra* note 47, at 236, 238.

basic moral rule, such as not intentionally abusing or deceiving persons, become so unattractive that one is morally permitted, even if not required, to engage in that abuse or deception in violation of the general rule?

Of course, no such precise point can be clearly established. Nor is there available any convincing theory of just how moral decisionmaking should make the apparent transition from avoiding intentional injuries to accepting intentional injuries for the sake of avoiding dramatically bad consequences or of obtaining good consequences. Initially, we are not interested in the minimally good results flowing from intentional wrongs, but later, when the nature of the payoff changes, then mysteriously, as through some gestalt shift, we take seriously the possible good consequences. One moral decisionmaking paradigm has somehow begun to pick up where another, apparently incommensurable paradigm has inexplicably left off.

This Article cannot genuinely answer the question of precisely where, if at all, it might become morally permissible for an attorney to intentionally abuse or mislead. But it is possible to bring the apparently incommensurable realms of avoiding intentional harm and of producing good outcomes into some sort of integrated relationship. This result can be achieved by assigning a mediating role to the ideas of character, virtue, and vice.

It should be specified that the idea of virtue and vice in this sense is not meant to enthrone some politically biased view of morally sound behavior. The idea of virtue and vice does not itself tell us what sorts of things really are virtuous and vicious. What any particular culture historically thought of as virtue or vice may not be similarly viewed today. Moreover, reference to character by itself does not imply much about who can fairly be held responsible for what or about whether some or all persons control their own moral circumstances.<sup>114</sup> Not all social problems can be fairly resolved by enjoining the sufferers to strengthen their character.

While the idea of character can be abused, it has not been established that the ideas of character, virtue, and vice are unavoidably too ideologically loaded, inherently authoritarian, intrusive, repressive, or otherwise dangerous to be used for any purpose. Consider the possibility of admiring genuine courage on the part of one with whom one disagrees.

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<sup>114</sup> See generally R. George Wright, *The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived*, 43 CATH. U. L. REV. 459, 463 (1994) (discussing those who have most been deprived of the "requisites of moral responsibility").

Character has, for much of our history, been important to ethical thought of various sorts,<sup>115</sup> and it may well have a role to play in our context.

Interestingly, codes of legal ethics have of late tended to reduce their emphasis on considerations of character.<sup>116</sup> This approach may reflect broader cultural trends, as well as a decreasing homogeneity in bar membership — character, virtue, and vice could thus no longer be equated with the conceptions of dominant social groups. But it is really not clear how changing bar demographics can explain a shift in emphasis from character to rules. Of course, different groups will bring different understandings of character, but why would they not also, or especially, bring different understandings of what rules are morally sound? If rules are more determinate and precise than considerations of character, then why would decreased bar homogeneity not lead to less agreement on determinate rules, as opposed to notions of character which might encompass, or disguise the presence of, many contrasting views? Why could a broader societal consensus not occur on courage or integrity and their value than regarding the rules about disclosure of a client's intended crimes?

A possible explanation is that lawyers find rules easier to apply and casually assume that if conceptions of character vary, the idea of character is officially useless. Perhaps unbending, minimum rules are thought more necessary in light of decreasing bar homogeneity. The bar thus emphasizes rules instead of character. But even if rules are easier to fairly enforce with due process than are considerations of character, costs associated with underplaying considerations of character are still incurred.

Consider the abusive cross-examination of a rape victim which the current rules of professional ethics permit. One might say that this conduct is nonetheless wrong because it violates some broader moral rule, as elaborated by Kant or the principle of double effect.<sup>117</sup> But the same conduct can be morally criticized without reference to any moral rule. It might, literally, be referred to as a "vicious" cross-examination. If pressed to elaborate, one might also refer to the cross-examination as "ruthless."

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<sup>115</sup> See, e.g., JUDITH N. SHKLAR, *ORDINARY VICES* 232 (1984) (referring to the ethics of character developed by Aristotle and Kant). For development of a largely Aristotelian ethics of character, see THOMAS AQUINAS, *TREATISE ON THE VIRTUES* (John A. Oesterle trans. & Univ. of Notre Dame Press ed., 1984). See generally KRONMAN, *supra* note 85; MICHAEL SLOTE, *FROM MORALITY TO VIRTUE* (1992).

<sup>116</sup> See MARY A. GLENDON, *A NATION UNDER LAWYERS* 79 (1994); see also KRONMAN, *supra* note 85; Leslie Griffin, *The Lawyer's Dirty Hands*, 8 *GEO. J. LEGAL ETHICS* 219, 266 (1995) (discussing KRONMAN, *supra* note 85).

<sup>117</sup> See *supra* notes 36-80 and accompanying text.

More formally, it might be thought that the cross-examination offers some evidence of the vicious character trait of ruthlessness.<sup>118</sup>

By this, it is not precisely meant that the cross-examiner has violated some moral rule or has failed to promote some good result or avoid some bad result. Rather, it might be, in this respect, that the cross-examiner's moral character is being evaluated.

Evaluation of the cross-examiner's moral character is important because one may, when making moral decisions, sometimes wish to modify even the most deeply felt moral rules in light of what is thought to be virtuous or vicious.<sup>119</sup> Following a generally sound moral rule may promote or require, on some occasions, vicious behavior. On the other hand, one need not think that someone who always maximizes the balance of good over bad and is willing to violate moral rules in order to do so is necessarily a good person. One would also want to know why that person chooses to produce such results; perhaps that person is selfishly motivated. How a person is morally evaluated may reflect her virtues and vices as much as the good or bad results she may have, for whatever reasons, sought.<sup>120</sup> Thus, neither following moral rules nor producing good outcomes exhausts the idea of virtue.

The ideas of virtue and character cannot beautifully unify moral rule-following and produced good outcomes into a homogeneous, seamless web. But they can offer some sort of integrating moral framework. Considerations of character can suggest a reason for being morally dissatisfied, for example, with an attorney who engages in legally permitted abuse or deception for some modest net gain. Such tactics may reflect bad character, but considerations of character may not always reinforce moral rule-following. For example, an attorney who habitually refuses to engage in a legally permitted act of minimal deception, even where that would be necessary to avoid a great injustice, either in the case at hand or more generally, may appear in some respects to be a person of questionable moral character. Devotion to principle is fine, but such a person may also seem uncaring, overly fastidious, unsympathetic, cold-hearted, or even self-indulgent. At the very least, such decisions may seem less than virtuous. Thus, attorneys might be of questionable moral character even if they do not narrowly intend any harm but only foresee

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<sup>118</sup> For philosophical reference to ruthlessness as a moral vice, see, e.g., Gregory Mellema, *Offence and Virtue Ethics*, 21 CAN. J. PHIL. 323, 327 (1991).

<sup>119</sup> See Gregory B. Pence, *Recent Work On Virtues*, 21 AM. PHIL. Q. 281, 290 (1984).

<sup>120</sup> See Robert Audi, *Volition, Intention, and Responsibility*, 142 U. PA. L. REV. 1675, 1703 (1994); Phillip Montague, *Virtue Ethics: A Qualified Success Story*, 29 AM. PHIL. Q. 53, 55 (1992).

such ensuing harm.<sup>121</sup> This assessment is especially clear in any case in which an attorney ghoulishly welcomes, without actually "intending," those foreseen harms.

Attention to character thus may help us reconcile, in some fashion, the competing pulls of moral rule-following and attention to good and bad outcomes. It is unfortunate that codes of legal ethics have recently downplayed such concerns, especially since the practice of litigation itself may well affect professional character. Even as adults and professionals, we gradually acquire virtues and vices through observation,<sup>122</sup> habit, and repeated practice.<sup>123</sup> Litigators, beginning in law school, presumably observe and engage in the questioning of witnesses and, over time, form habits of cross-examination. Once formed, habits, whether virtuous or vicious, take on a certain motivational power of their own.<sup>124</sup> Current rules of legal ethics thus underemphasize the significance of virtue at their own peril to the detriment of participants in the adjudicative process.

## VI. CONCLUSION: QUESTIONABLE ADVERSARIAL TACTICS AND SOCIAL JUSTICE

This Article's cross-examination of legal ethics should be concluded by considering a final dimension of the problem. It is commonly and plausibly assumed that the adversary system of litigation works best with opposing parties of roughly equal capabilities and resources.<sup>125</sup> Obvi-

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<sup>121</sup> This point is fully compatible with recognizing that we judge character by intentions, as opposed to unintended consequences. See PHILIPPA FOOT, *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 4 (1978).

<sup>122</sup> See, e.g., Jean Baechler, *Virtue: Its Nature, Exigency, and Acquisition*, in 34 *NOMOS: VIRTUE* 25, 48 (John W. Chapman trans., John W. Chapman & William A. Galston eds., 1992).

<sup>123</sup> See AQUINAS, *supra* note 115, at 27 ("[A] habit of virtue cannot be caused by one act, but only by many."); ARISTOTLE, *NICOMACHEAN ETHICS*, Book Two 55-56; *id.*, Book Five, at 141 (J.A.K. Thomson trans., Penguin ed., 1953); R. Jay Wallace, *Virtue, Reason, and Principle*, 21 *CAN. J. PHIL.* 469, 475 (1991).

<sup>124</sup> See RICHARD B. BRANDT, *MORALITY, UTILITARIANISM, AND RIGHTS* 311 (1992); see also *id.* at 289 (describing virtues as more or less fixed dispositions "to desire an action of a certain sort").

<sup>125</sup> See, e.g., Judith Resnick, *The Declining Faith in the Adversary System*, 13 *LITIGATION* 3, 4 (1986); Rhode, *supra* note 27, at 598; see also LUBAN, *supra* note 83, at 60 (describing zealous advocacy by criminal defense counsel, as opposed to criminal prosecution, as a mechanism to restrain or handicap the state for the sake of civil liberties); Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 *IND. L.J.* 301, 354-55 (1988) (stating that adversarialism requires "that the strongest arguments for and against proposed social change be made").



ously, this condition is not always met. Cases occur in which a primary point of the litigation is to promote social change, sometimes on behalf of precisely those persons not in a position to litigate as equals to their adversaries. Professional ethics codes do not generally address what differences, if any, litigating on behalf of such social change is thought to make. Can different styles of cross-examination, including abuse and deception, perhaps be justified for the sake of social change?

As this Article's discussion of character suggests, one cannot rule out the legitimacy of abuse or deception if necessary to achieve a sufficiently worthwhile social goal. In such a case, it might be morally defensible to litigate not only up to the officially sanctioned limits, but beyond those limits as well. No guarantee exists that lawyers, as a relatively well-off segment of society, will ensure that the rules of legal ethics optimally promote the interests of those who are poor. In such cases, it must always be questioned whether the anticipated payoff of enhanced social justice is indeed likely, and whether any degree of abuse or deception is necessary to achieve that payoff.

It is important to bear in mind that whatever their overall value, many familiar moral rules, such as those generally prohibiting lying, theft, and assault, may not be socially or economically class-neutral in their effects. For example, even a rule barring medical transplants without the consent of the donor predictably benefits some groups more than others.<sup>126</sup> Moreover, something is vaguely suspect about touting increased limits on adversarial excesses just when some less fortunate groups are beginning to effectively litigate their claims.<sup>127</sup> If rich and poor do not address each other in an open, unconstrained, unbiased manner through the legal system,<sup>128</sup> abuse or deception might tend to offset systemic biases against the poor. Morally questionable litigation tactics might at least provide a benefit in terms of increased publicity for the client or cause, which may be important at certain historical stages.

The use of such tactics, however, is a risky business at best. Societal reform through litigation is generally difficult.<sup>129</sup> It may well be that

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<sup>126</sup> See SCHEFFLER, *supra* note 56, at 113 (comparing the effect on society as a whole with the effect on individual groups).

<sup>127</sup> See GOLDMAN, *supra* note 27, at 125 (discussing the vulnerability of those with either inadequate or no representation).

<sup>128</sup> See, e.g., Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1627 (1988); see also Jurgen Habermas, *Discourse Ethics: Notes On a Program of Philosophical Justification*, in THE COMMUNICATIVE ETHICS CONTROVERSY 60, 62 (Seyla Benhabib & Fred Dallmayr eds., 1990) (arguing that judgments should be made in an unconstrained impartial environment).

<sup>129</sup> See generally RICHARD DELGADO & JEAN STEFANCIC, *FAILED REVOLUTIONS:*

adversarial tactics even vaguely associated with abuse or deception more commonly retard rather than promote litigation-induced social change. This is probably true regardless of how powerful the targets of one's abuse or deception may be. It will not normally be the case that publicity can be maximized only through abusive or deceptive cross-examination by attorneys. Social change may be more broadly accepted if its judicial proponents are perceived as striving for fairness, openness, insight, and judgment,<sup>130</sup> rather than as experimenting with the moral limits of abuse, deception, and other forms of dubious adversarialism.

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SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION (1994); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

<sup>130</sup> See LUBAN, *supra* note 83, at 109.